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Supreme Court of the United States

OCTOBER TERM, 1970

No. 107

HAZEL PALMER, *et al.*,

Petitioners,

—v.—

ALLEN C. THOMPSON, Mayor, City of Jackson, *et al.*,

Respondents.

BRIEF FOR PETITIONERS

GOODMAN, EDEN, ROBB, MILENDER,
GOODMAN & BEDROSIAN

By ERNEST GOODMAN, PAUL A. ROSEN
WILLIAM H. GOODMAN
3200 Cadillac Tower
Detroit, Michigan 48226

CENTER FOR CONSTITUTIONAL RIGHTS

By WILLIAM M. KUNSTLER
ARTHUR KINOY
588 Ninth Avenue
New York, New York 10036

W. WILLIAM HODES
305 Baronne Street
New Orleans, La. 70112

Attorneys for Petitioners

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Opinions Below

The letter-opinion, and findings of fact and conclusions of law of the district court are reproduced in the Appendix at 23-31.

The original opinion of the three-judge panel of the Fifth Circuit Court of Appeals was entered on August 29, 1967, and is reported at 391 F.2d 324 (A. 34).

The three opinions on rehearing *en banc* are reported together at 419 F.2d 1222. The majority opinion was entered on October 9, 1969, the dissenting opinion on November 25, 1969, and the special concurring opinion on January 7, 1970. These opinions are reproduced in the Appendix at 44, 56, and 55, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on October 9, 1969, and the time in which to file a petition for certiorari was extended by Mr. Chief Justice Warren Burger to March 8, 1970. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1). The petition for certiorari was granted by this Court on April 20, 1970, —— U.S. ——, 90 S. Ct. 1364 (1970).

Statutes and Constitutional Provisions Involved

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE, TITLE 42

§1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

* * * * *

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceedings for redress.

Question Presented

Where the City of Jackson, Mississippi, has historically maintained a "steel hard, inflexible, undeviating official policy of segregation" and where this policy has been manifested, among other ways, by denying blacks access to public swimming facilities provided for whites and where, as a result of legal action brought by black citizens of Jackson, the federal court has ordered these facilities to be operated only on an integrated basis, did the city's action in closing these swimming facilities to avoid the integration order violate rights guaranteed the black people of Jackson under the Thirteenth and Fourteenth Amendments, and 42 U.S.C. §1981?

Statement of the Case

The City of Jackson and the State of Mississippi have for many years maintained a "steel-hard, inflexible, undeviating official policy of segregation," *United States v. City of Jackson*, 318 F.2d 1, 5 (5th Cir. 1963). This is the single most important fact[1] in the present case, and provides the backdrop for the events which led to the institution of this litigation.

Respondents, the Mayor and other public officials of the City of Jackson, are bound by Mississippi law[2] to resist

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[1] This statement is deliberately made here and not in the "argument" section of the brief, for we do not consider it either an opinion or a legal argument, but a matter of historical fact. Most Americans deplore this state of affairs; some Americans hail it—but no one who had read a newspaper in the last ten years doubts that it is indeed a fact.

[2] See Miss. Code §4065.3, the full text of which is reproduced in the Appendix to the Brief Amicus Curiae of James Moore, et al., at 7a.

integration in all public places, and to interfere, whenever possible, with the integration orders of any branch of the federal government. A statement of the present case is indeed no more than a history of how the public officials of Jackson faithfully carried out this State policy, in an attempt to prevent integration of the municipal swimming and wading pools at all costs.

Prior to 1962, all public recreational facilities operated by the City of Jackson were operated on a segregated basis, including the swimming and wading pools involved in this case (A. 7-14). A group of black citizens brought suit to integrate these facilities, and obtained a declaratory judgment in *Clark* v. *Thompson,* 206 F. Supp. 539 (S.D. Miss. 1962); *aff'd,* 313 F.2d 637 (5th Cir., 1963); *cert. denied,* 375 U.S. 951 (1963). As both courts below found, and as the respondents freely admit (second Kurts affidavit, A. 18; Thompson affidavit, A. 21), the municipal swimming pools were closed after this decision, and solely because of it. The majority below found that "the City decided to close the pools rather than to operate them on an integrated basis" (A. 47),[8] while the concurring opinion went even further and said that "it may not be disputed, that the closings here were racially motivated" (A. 56).

In May of 1963, shortly after the affirmance of *Clark* by the Fifth Circuit Court of Appeals, and as the summer season approached, Mayor Thompson, by his public statements and actions made it clear that, even if integration had to be tolerated in some public facilities, the swimming and wading pools would never be integrated. Some of

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[8] The extent of the majority's concession of the racial motivation behind the closing of the pools can be seen in its startling introductory phrase "[E]ven though such motive obviously stemmed from racial considerations. . . ." (A. 54).

these statements are gathered together in Appendix B to the affidavit of Carolyn Stevens (A. 15-16). As the *Jackson Daily News* reported, for example, "Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation" (A. 16).

On May 27, 1963, a group of black citizens met with the Mayor and other officials, in an attempt to insure that the desegregation orders of the federal courts would be honored (A. 4-5). Instead, only three days later the Mayor announced that the pools would not open "due to some minor water difficulty" (A. 5). In point of fact, there was no "water difficulty," for, as the Mayor himself later stated in an affidavit filed in this case, "the City made the decision subsequent to the *Clark* case to close all pools owned and operated by the City to members of both races" (A. 21). The pools remain closed to this date, and according to the Mayor's own affidavit, it is the intention of the City of Jackson to keep them closed forever, rather than operate them on an integrated basis (A. 21).[4]

Shortly after the pools were closed, the City divested itself of the one pool which it had leased rather than owned, Leavell Woods, and turned it over to the Southwest Branch of the YMCA. The YMCA immediately began to operate this pool on a white-only basis—an operation made possible only because of the City's action (A. 5-6). Respondents must have known that the pool would be operated on such a segregated basis once it reached a segregated YMCA.[5]

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[4] However, the City is maintaining all of the pools owned by it (A. 17). Thus, petitioners and the members of their class are supporting through their taxes waterless pools which they cannot use.

[5] See ¶15, affidavit of Carolyn Stevens, A. 6.

The present suit was filed as a class action after efforts by the black community to have the pools reopened failed. It was in response to this suit that the city officials—for the first time—claimed that the closing of the pools was necessary to maintain public order, and because it would be uneconomical to operate the pools on an integrated basis (Affidavits of Kurts and Thompson, A. 16-22).

The record contains no proof whatsoever of either of these claims, only two self-serving and wholly conclusory affidavits (A. 16-22). The Mayor's affidavit baldly states that the City "realized" that public safety would be endangered by the operation of integrated pools, and "realized" that such operation would be uneconomical. There is no discussion of threats of violence, of actual disorders, or any elaboration of how the "personal safety" of anyone would be adversely affected if the pools were opened on an integrated basis. There is no prediction that black youths would assault white swimmers or that white citizens would attempt to prevent blacks from using the pools. Still less, of course, is there any evidence that any such incidents actually occurred, since the pools never were integrated. Nor is there any reason to believe that such incidents—if they had occurred—could not have been handled adequately by Jackson's police force. Mayor Thompson offered no evidence on economic matters.

The affidavits of George Kurts, Director of the City Parks, add nothing to the assertion that the public safety was endangered, and little to the claim that the pools would be uneconomic to operate *on an integrated basis.* To the contrary, his first affidavit reveals that they were operated at a loss *even when segregated* (A. 17), and there is no indication whatsoever that the pools would lose more money,

or, indeed, lose any money at all, if integrated. There is no discussion of whether it would be feasible to operate only certain of the pools, or whether it would make economic sense to raise or lower slightly the price of admission to the pools. Significantly, no explanation was offered as to why it was economically possible to operate all of the other public facilities in the City on an integrated basis, but "a serious financial loss" would result from such operation of the swimming pools in particular. Also left unproved was the question of how "serious" the financial loss would be, and how that loss would compare to those sustained by the City in other public endeavors.

Respondents presented *no other evidence*[6] to rebut the presumption[7] that the closing of the pools was for a discriminatory purpose and solely to avoid the effects of *Clark* v. *Thompson*. After a hearing on petitioners' motion for temporary relief, however, the District Court denied relief in a letter-opinion of September 14, 1965 (A. 23). By stipulation of the parties (A. 32), no further evidence was adduced, and the District Court rendered its final finding of facts and conclusions of law on the record as it then stood (A. 27). The Court's findings of fact were taken directly from the answer and affidavits of the respondents.

On appeal to the Fifth Circuit Court of Appeals, a three-judge panel affirmed the decision below, accepting without question the findings of fact, 391 F.2d 324 (A. 34). Subsequently the Court of Appeals, on its own motion,

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[6] As the majority below noted, the respondents stipulated that they had had "an opportunity to offer any and all evidence desired." (A. 46. The stipulation is at A. 32.)

[7] Cf. *Watson* v. *City of Memphis*, 373 U.S. 526 (1963) and *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189 (4th Cir. 1966), discussed more fully *infra*.

ordered a rehearing *en banc* (A. 44). The rehearing resulted in three separate opinions, all reported at 419 F.2d 1222, and reproduced in the Appendix, beginning on page 44.

The majority of seven judges, again accepting the lower court's findings of fact, held that the closing of the pools was justified. The concurring opinion, joined by the entire seven-judge majority, clarified the majority opinion by stating that although the closings were "racially motivated," that, in itself, was not evidence of a "racially discriminatory purpose." The concurring opinion specifically put the burden of proof on petitioners, instead of putting the City to the burden of proving *lack* of discriminatory intent.

Six judges dissented in an opinion written by Judge Wisdom. The dissent rejected completely the excuses offered by the respondents, and thus rejected the district court's findings of fact. The dissent argued that racial motivation was *inherently* discriminatory, regardless of the fact that the pools were closed to white citizens as well as black.

This Court granted a petition for a writ of certiorari, to review the decision of the Fifth Circuit, —— U.S. ——, 90 S. Ct. 1364. More than seven years after a federal court declared that Jackson's swimming pools should be integrated, and more than fifteen years after *Dawson* v. *Mayor and City Council of Baltimore,* 350 U.S. 877 (1955), this Court will finally have the opportunity to say whether City officials may frustrate that decision by the simple expedient of closing the pools entirely.

Summary of Argument

I.

Violation of the Fourteenth Amendment.

A. The sole reason for closing the pools was to avoid the integration orders of *Clark* v. *Thompson*. The excuses of safety and economy are mere smokescreens, based entirely upon the unsupported speculations of City officials. The courts below committed clear error when they accepted these excuses as matters of fact, since in cases dealing with racial prejudice, a community with a long history of opposition to integration has the burden of proving its *lack* of discriminatory intent.

B. If the sole reason for the closing of the pools was indeed to avoid integration, the closings are obviously illegal and a violation of the Equal Protection Clause. *Evans* v. *Newton; Evans* v. *Abney; Griffin* v. *County School Board of Prince Edward County.*

C. Even if it is true that integrating the pools would be in some degree unsafe or economical, that is still no justification for their closing, if the result is to deny the facilities to black citizens. *Buchanan* v. *Warley; Cooper* v. *Aaron; Watson* v. *City of Memphis.*

D. The argument that the closings affect black and white citizens alike, and, therefore, do not discriminate against blacks, is a betrayal of the "inherently unequal" theory of *Brown* v. *Board of Education,* and a return to the repudiated separate-but-equal theory of *Plessey* v. *Ferguson.*

E. By closing the public pools and leaving the way open for private pools to operate on a segregated basis, and by directly facilitating the white-only operation of the Leavell Woods pool by the YMCA, the City of Jackson has put its power and prestige behind private discrimination, and involved the State to an unconstitutional degree.

II.

Violation of 42 U.S.C. §1981.

Black citizens successfully brought suit to integrate the municipal swimming pools in *Clark* v. *Thompson*. The City's response was to close the pools altogether, leaving the successful plaintiffs in a worse position than they had been in before the suit, when they, at least, had one segregated pool in which to swim. By punishing black citizens for using the federal courts, the City has denied to them the same free access to the courts "as is enjoyed by white citizens," and thus violated §1981. Punishment for successful litigation also chills the right to resort to legal processes in the future.

III.

Violation of the Thirteenth Amendment.

The theory of the City of Jackson in closing the pools was that black people are inferior, and, therefore, altogether unfit to swim together with white people. This ideology of racial inferiority was the bedrock axiom of slavery and of *Dred Scott*, and was therefore eradicated by the Thirteenth Amendment.

This Court must decide whether to allow the City of Jackson thus to impose a badge of slavery, or whether it

will stand firm by the promise of the Thirteenth Amendment, as it did in *Jones* v. *Alfred H. Mayer Co.*

ARGUMENT

I.

The decision below violates the Fourteenth Amendment.

A. *The Sole Reason for Closing the Municipal Swimming Pools Was to Prevent Integration.*

Starkly presented, the nub of this case is that the City of Jackson, rather than face the seemingly horrendous prospect of black and white bodies bathing together in its swimming pools, decided to close those facilities entirely. While this may be pointedly analogous to the old saw about cutting off one's nose to spite one's face, it is perhaps the logical last resort of Mississippi's and the City's "steel-hard, inflexible, undeviating, official policy of segregation." *United States* v. *City of Jackson,* 318 F.2d 1, 5 (5th Cir. 1963). Faced with the fall, one by one, of its barriers against what it euphemistically refers to as "mixing,"[8] that state and, in particular, its capital city, have retreated to a final line of defense—to close certain "delicate" public facilities rather than operate them on an integrated basis.

One hardly needs "long exposure to obvious and non-obvious racial discrimination" (A. 56) to see through the twin excuses offered by respondents (and accepted at face value by both the district court and the majority below).

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[8] See, e.g., *United States* v. *City of Jackson,* and *Clark* v. *Thompson,* both *supra.* See also the cases cited in footnotes 18 and 23, pp. 19 and 24 respectively, *infra.*

As Circuit Judge Rives himself pointed out in the majority opinion,

> Nor did the [district] court find any intent to chill or slow down the integration *of other recreational facilities*. To the contrary, as the Mayor's affidavit states, those were completely desegregated and made available to all citizens of the City regardless of race (A. 47). (Emphasis added.)

But bodies do not touch on such "other recreational facilities" as golf courses, tennis courts or playground swings —they do in swimming pools. The racial paranoia that lies behind segregation as an institution is nowhere more virulent than where physical contact between the races is involved.[9] The City's justification, which passed muster with the courts below, is nothing more or less than desperate nonsense to support the unsupportable.

Significantly, the majority below conceded that "the City's decision to close the pools" stemmed from racial considerations (A. 54).[10] In his concurring opinion, Circuit Judge Bell put it even plainer. "We can easily surmise, indeed it may not be disputed, that the closings here were

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[9] The sexual phobia generated by the possibility of even accidental physical contact between lightly clad black and white bodies in swimming pools, and which lies back of the Mayor's self-fulfilling prophecy, is part and parcel of the racial mythology that has done so much to divide us as a people. See e.g., W. S. Cash, *The Mind of the South*, Doubleday Anchor (A. 27), New York, N. Y. (1941); George W. Cable, *The Negro Question*, Doubleday Anchor (A. 144), New York, N. Y. (1958); C. Vann Woodward, *Reunion and Reaction*, Doubleday Anchor (A. 83), New York, N. Y. (1954); and the novels of William Faulkner.

[10] The majority's reliance on *Brooks* v. *Beto*, 366 F.2d 1 (5th Cir. 1966) is sadly misplaced. There, "racial considerations" were utilized to *undo* the effects of segregation, whereas here the effect is to forever *perpetuate* injustice.

racially motivated" (A. 56). Indeed, no fair-minded person could, after reading the record, even in a light most favorable to respondents, come to any other conclusion than that the closing of the pools was, as Mayor Thompson himself put it in his affidavit, to prevent their being operated "on an integrated basis" (A. 21).[11]

The intimation by Circuit Judges Rives and Bell that "racial discrimination" as distinguished from "racial motivation," could have been discovered by "a full evidentiary hearing" below (A. 56), makes no sense whatsoever if, as we urge and this Court has so often stated, the terms are synonymous in a constitutional sense.[12] Actions that are the result of "racial motivations" are *per se* discriminatory insofar as black people in this country are concerned. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Griffin* v. *County Board of Prince Edward County*, 377 U.S. 218

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[11] In *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1966), the Fourth Circuit rejected a myriad of reasons given by a North Carolina school board to justify its failure to rehire a black teacher, on the ground that "to accept such an analysis we would have to pretend not to know as judges what we know as men," and found that "the only reasonable inference . . . was the Board Members' objections to her racial activity." 364 F.2d at 182.

[12] Indeed, Circuit Judge Bell's strange concurring opinion is virtually a confession of error on the part of the majority. After conceding that the only reasons advanced by respondents for closing the pools were safety and economy, *and knowing full well that they cannot constitutionally justify such closings*, Judge Bell, in effect, suggested to this Court that "it may be that on full hearing a factual base could be developed for the constitutional principles announced by the dissenting opinion" (A. 56). However, we believe that a summary reversal is in order, and not a remand for a factual hearing. Petitioners have presented far more than a prima facie case, and the failure of proof must be charged to the respondents, since they had every opportunity to attempt a rebuttal, but instead presented only self-serving *and legally insufficient* affidavits. See Part C, *infra*.

(1964); *Adickes* v. *S. H. Kress and Co.*, —— U.S. ——, 90 S. Ct. 1598 (1970).[13]

In *McLaughlin* v. *State of Florida*, 379 U.S. 184 (1964), Mr. Justice White emphasized the standard that must be applied to the facts of this case. As he said:

> But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," Bolling v. Sharpe, 347 U.S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884; and subject to the "most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216, 65 S. Ct. 193, 194, 89 L. Ed. 194; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 100, 65 S. Ct. 1375, 1385, 87 L. Ed. 1774. Thus it is that racial classifications have been held invalid in a variety of contexts. See, e.g., Tancil v. Woolls (Virginia Board of Elections v. Hamm), 379 U.S. 19, 85 S. Ct. 157 (designation of race in voting and property records); Anderson v. Martin, 375 U.S. 399, 84 S. Ct. 454, 11 L. Ed.2d 430 (designation of race on nomination papers and ballots); Watson v. City of Memphis, 373 U.S. 526, 83 S. Ct. 1314, 10 L. Ed.2d 529 (segregation in public parks and playgrounds); Brown v.

[13] "Few principles are more firmly stitched into our constitutional fabric than the proposition that a state must not discriminate against a person because of his race . . . or in any way act to compel or encourage racial segregation," *Adickes* at 1605.

Board of Education, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (segregation in public schools).

(379 U.S. at 191-2)

Given the conceded "racial motivation" of respondents, their actions are "constitutionally suspect" and subject to the "most rigid scrutiny" and " 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose." [14]

Respondents, guilty of generations of racial discrimination, have the clear burden of justifying, on non-racial grounds, their official acts which adversely affect black persons. See *Eolfe* v. *County Board of Education of Lincoln County,* 391 F.2d 77, 80 (6th Cir. 1968); *Chambers* v. *Hendersonville City Board of Education,* 364 F.2d 189, 192 (4th Cir. 1966); *Alabama State Teachers Ass'n* v. *Lowndes County Board of Education,* 289 F. Supp. 300, 305 (M.D. Ala. 1968).[15] This they have patently failed to do, their affidavits consisting of nothing more than self-serving assertions.[16]

As Mr. Justice Brennan said in his dissenting opinion in *Evans* v. *Abney,* —— U.S. ——, 90 S. Ct. 628 (1970), with respect to the park in Macon, Georgia,

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[14] Cf. Mr. Justice Stewart's observation that "I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense" (379 U.S. at 198).

[15] See also *Eubanks* v. *Louisiana,* 356 U.S. 584 (1958); *Reece* v. *Georgia,* 350 U.S. 85 (1955); *Avery* v. *Georgia,* 345 U.S. 559 (1953); and *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969).

[16] The worthless quality of such affidavits, particularly where racial discrimination is an issue, can be seen in *Dawkins* v. *Green,* 412 F.2d 644 (5th Cir. 1969).

> No record could present a clearer case of the closing of a public facility for the sole reason that the public authority which owns and maintains it cannot keep it segregated.

90 S. Ct. at 637. The same is true here; we maintain that it is not so that "the reasons or motives for [the closing of the swimming pools] are arguably unclear," *id.*, but, as we argue in Point I C, *infra*, even if it were unclear, the respondents' justifications are legally insufficient.

To give even an arguable validity to respondents' two reasons for closing the pools is to make the Queen of Heart's decisional processes seem entirely reasonable. If the City's decision had been based on a period of prior operation, with documented evidence of unfeasibility, one might at least give it some attention.[17] But where, as here, it was based *solely and exclusively* on official speculation about what *might* happen if the pools were put on an integrated footing, it cannot possibly justify the violation of constitutionally protected rights. If the reasons advanced by respondents to justify their actions are sanctified by this Court, then it is highly likely that no integrated municipal swimming pool facilities will ever exist in the deep South.

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[17] "We do not say that a city may never abandon a previously rendered municipal service. *If the facts show* that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation and would therefore not offend the Constitution." Dissenting opinion below (A. 73, n. 16) (emphasis added).

B. *The Closing of the Municipal Swimming Pools to Avoid Integration Is a Violation of the Equal Protection Clause of the Fourteenth Amendment.*

Evans v. *Newton,* 382 U.S. 296 (1966) and *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 (1964) are thoroughly dispositive of the issue before this Court, for they both hold, simply and directly, that state officials may not close public facilities to avoid integration.

In the ringing opinion of Mr. Justice Douglas in *Evans,* the attempt to change the character of a park in Macon, Georgia, from public to private for the purpose of excluding Negroes from enjoying its benefits was to "implicate the State in conduct proscribed by the Fourteenth Amendment." 382 U.S. at 302. An attempt to withdraw a previously public park in order to prevent its integrated use is hardly distinguishable from the closing of public swimming pools to obtain the same result. Here the City's involvement with the pools is a continuing one, for, at a minimum, it is expending tax monies to maintain them.

As Mr. Justice Douglas pointed out, "mass recreation through the use of public parks is plainly in the public domain. *Watson* v. *City of Memphis,* 373 U.S. 526, 83 S. Ct. 1314, 10 L. Ed.2d 529 . . . " *Id.* In considering the effect of any action concerning such facilities, courts must engage in " 'sifting the facts and weighing the circumstances' on a case-to-case basis . . . " *Reitman* v. *Mulkey,* 387 U.S. 369, 378 (1967). Such cases "exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations." (*Id.* at 380).

It is true that only last term this Court reconsidered the status of the park in Macon, Georgia, and permitted it to return to private hands. *Evans* v. *Abney*, —— U.S. ——, 90 S. Ct. 628 (1970). But the decision in that case wholly supports the position here advanced by petitioners. There, Mr. Justice Black, writing for a majority of this Court, stated that the closing of a public park "solely to avoid the effect of a prior court order directing the park to be integrated . . . would be clearly distinguishable from the case at bar because *there it is the State* and not a private party *which is injecting the racially discriminatory motivation*" (90 S. Ct. at 633) (emphasis added). This case is precisely the hypothetical posed by the Court in *Abney*, for here we have undisguised state action.

In *Abney*, this Court found no violation of constitutionally protected rights. In affirming the decision of the Georgia Supreme Court that Senator Bacon's trust had failed, this Court specifically emphasized the fact that "any harshness that may have resulted from the state court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of Senator Bacon's will." *Id.* But here the obvious "harshness" is attributable squarely to the city's intention to effectuate as nearly as possible its "steel-hard . . . policy of segregation." *United States* v. *City of Jackson*, 318 F.2d at 5.[18]

[18] As Mr. Justice Black indicated, "the Georgia court had no alternative under its relevant trust laws, which are *long standing and neutral with regard to race*, but to end the Baconsfield trust and return the property to the Senator's heirs." 90 S. Ct. at 633 (emphasis added). The City of Jackson's "long standing" actions which are non-neutral "with regard to race" are too well-known to require detailed documentations here. Cf. *NAACP* v. *Thompson*, 357 F.2d 831 (5th Cir. 1966); *Strother* v. *Thompson*, 372 F. 2d 654 (5th Cir. 1967); and *Guyot* v. *Pierce*, 372 F.2d 658 (5th

As the Court stated in *Abney*, "the Baconsfield trust 'failed' under [Georgia] law not because of any belief on the part of any living person that whites and Negroes might not enjoy being together, but rather because Senator Bacon who died many years ago intended that the park remain forever for the exclusive use of white people." 90 S. Ct. at 634. In Jackson, Mississippi, it is not the intent of a man long dead that is controlling but rather that of "living persons" who are determined to deny to petitioners and the members of their class their fundamental constitutional rights. The tragic result in *Abney* as "part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death," 90 S. Ct. at 635, need not be repeated here where no such considerations exist.

Mr. Justice Black's language in *Griffin* likewise went straight to the heart of the issue.

> "But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place . . . for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstance, go to the same school."

377 U.S. at 231. Mr. Justice Black continued:

Cir. 1967). In this connection, see also the mosaic of racially motivated statutes enacted by Mississippi after 1956, contained in footnotes 4-9 of Mr. Justice Brennan's concurring and dissenting opinion in *Adickes*, 90 S. Ct. at 1623-25. Mr. Justice Douglas' catalog is equally impressive, *id.* at 1643-44.

> Whatever non-racial grounds might support a state's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.

Id." No one, knowing anything about Mississippi and its official hard core racism, can possibly doubt that the object of closing the pools is not "a constitutional one," or that this action was based on "grounds of race and opposition to desegregation." As Mayor Thompson candidly put it, in discussing the swimming pools, ". . . we are not going to have any intermingling" (A. 15).

C. *The Justification That the City of Jackson May Close Its Municipal Swimming Facilities "When They Cannot Be Operated Economically or Safely on an Integrated Basis" Is Constitutionally Invalid.*

Even if the totally unproved conjecture of the City officials—that integrated swimming pools in Jackson would be dangerous and uneconomical—were true, that is still not an excuse to close rather than integrate public facilities.

As early as 1917, and consistently thereafter, this Court has reiterated that black American citizens cannot be denied the equality and freedom unconditionally guaranteed to them by the Civil War Amendments because their enjoyment of the status might threaten the public peace.[29] Mr.

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[28] Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *United States* v. *Reading Co.*, 226 U.S. 324 (1912); and *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105 (1918).

[29] Significantly, one of the justifications advanced in *Plessey* v. *Ferguson*, 163 U.S. 537 (1896), to establish "separate but equal" as a national concept was "the preservation of the public peace

Justice Day's words on this subject are as applicable today as they were when the Court, in *Buchanan* v. *Warley*, 245 U.S. 60 (1917), held that "an ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville" which restricted Negroes to the purchase or leasing of real property to blocks which were inhabited by a majority of black people, violated the Fourteenth Amendment. "It is urged," he wrote, "that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution." 245 U.S. at 81.[21]

In *Cooper* v. *Aaron*, 358 U.S. 1 (1958), the Court, while in total sympathy with the problems of the Little Rock, Arkansas, Independent School District, refused to permit "the constitutional rights of [Negro school children] . . . to be sacrificed or yielded to the violence and disorder which

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and good order," *id.* at 550. The first Mr. Justice Harlan had quite the opposite view of what it is that disturbs the peace:

> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the grounds that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?

Id. at 560. Whose view was historically correct? See, *Report of the National Advisory Commission on Civil Disorders* (Kerner Commission).

[21] The *Buchanan* Court also disposed of contentions that constitutional rights may be curtailed by the vagaries of economics. "It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results." 245 U.S. at 82.

have followed upon the action of the Governor and Legislature . . . Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights." *Id.* at 16.[22]

The Court's unanimous opinion was in response to a petition by the School Board and the Superintendent of Schools to postpone their desegregation program "because of extreme public hostility . . . engendered largely by the official attitudes and actions of the Governor and the Legislature. . . . " *Id.* at 12. The district court granted the petition after finding that there were "repeated incidents of more or less serious violence directed against the Negro students and their property . . . " *Id.* at 13; *see also* 163 F. Supp. 13 (E.D. Ark. 1958). This Court affirmed a reversal by the Eighth Circuit of the district court's decision, even though it accepted the latter's findings of fact.

In the instant litigation, there is absent the past history of violence and disorder so dramatically present in *Cooper*. The courts below simply accepted at face value the claims of the Mayor and other public officials of the City that the operation of these pools on an integrated basis would endanger "the personal safety of the citizens of the City . . . " Even assuming, *arguendo*, this to be the case, the fault lies wholly with the State of Mississippi and the City of Jackson, and the tragic history of their wholehearted encouragement of illegal resistance to any efforts

[22] The anguished objections of officials of the City of Jackson, that black and white American citizens who insisted on exercising their constitutional prerogative of riding buses together into that municipality in the spring and summer of 1961 would provoke others to breaches of the peace, were summarily rejected by this Court in *Thomas* v. *Mississippi*, 380 U.S. 524 (1965).

at integration.[23] As the *Cooper* Court put it, "the record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond the unaided power to control is the product of state action. Those difficulties . . . can also be brought under control by state action." 358 U.S. at 16.[24] The City of Jackson must meet its self-created problems by other means than depriving its black residents of their most fundamental rights.[25]

The argument that it is "unsafe" to integrate public facilities received its most recent rejection in *Washington* v. *Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*,

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[23] In addition to the cases and statutes previously cited, see *Meredith* v. *Fair*, 305 F.2d 343 (5th Cir. 1962); *United States* v. *Barnett*, 376 U.S. 681, 683-86 (1964); *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir. 1963).

[24] See Mr. Justice Brennan's opinion in *Adickes* v. *S. H. Kress Co.*, *supra*, where he stated:

> The protection of constitutional rights may not be watered down because some members of the public actively oppose the exercise of constitutional rights by others. Cooper v. Aaron, 358 U.S. 1 (1958). To give any weight at all to that argument would be to encourage popular opposition to compliance with the Constitution. Moreover, the argument is particularly devoid of merit in the context of §1983, which was enacted by a Congress determined to stamp out widespread violations of constitutional rights at virtually any cost, and which imposed liability even on persons who simply failed to prevent certain violations.

90 S. Ct. at 1642-43.

[25] As Circuit Judge Wisdom so aptly pointed out in his dissenting opinion, "the City of Jackson's operation of other public recreational facilities on a desegregated basis indicates that the city's law enforcement officers are able to preserve peace and that the pools were closed not to promote peace, but to prevent blacks and whites swimming in the same water" (A. 59). At the same time, he observed that public swimming pools in both New Orleans and Tallahassee, which originally closed rather than operate on an integrated basis, have now been reopened on an integrated basis without significant incident. *Id.*

390 U.S. 333 (1968). A three-judge court held laws requiring segregation in Alabama jails to be unconstitutional, and that the practice could not be justified by appeals to security and public order. The court established a one year maximum deadline for the total integration of the prisons—even in maximum security jails. This Court affirmed, *per curiam* and without comment.

Petitioners' position is supported, perhaps best of all, by *Watson* v. *City of Memphis*, 373 U.S. 526 (1963), for that case simultaneously demolishes appeals to both safety *and* economy. In that case, the City was arguing for a delay in the implementation of integration in its public parks. The Court first differentiated between schools and other facilities, stating that desegregation of schools was a more delicate and difficult task, and that the "all deliberate speed" concept should not be applied in other areas of the law, 373 U.S. at 530-32.

What the Court then said about a *six month delay* in park integration must apply *a fortiori* to the total and permanent *abandonment* of integration, as here:

> The claims of the city to further delay in affording the petitioners that to which they are clearly and unquestionably entitled cannot be upheld except upon the most convincing and impressive demonstration by the city that such delay is manifestly compelled by constitutionally cognizable circumstances warranting the exercise of an appropriate equitable discretion by a court. *In short, the city must sustain an extremely heavy burden of proof.*

Id. at 533 (emphasis added). When the City there raised the same old spectre of public unrest as an excuse, this Court replied:

> The compelling answer to this contention is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.

Id. at 535. And the Court continued, in words again wholly applicable to this case:

> Beyond this, however, neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials. There is no indication that there had been any violence or meaningful disturbances when other recreational facilities had been desegregated.

Id. at 536.

Finally, Mr. Justice Goldberg, writing for a unanimous Court, came to the City's assertion that integration would be more costly, presumably because more supervision would be needed:

> There is no warrant in this record for assuming that such added supervision would, in fact, be required, much less that police and recreational personnel would be unavailable to meet such needs if they should arise. More significantly, however, it is obvious that *vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.*

Id. at 537 (emphasis added).

In the present case, the City of Jackson has not even advanced a theory as to why integration would be more costly—there is merely a bald assertion to that effect. *Watson* makes it abundantly clear, however, that such an assertion—even if true—is not a constitutionally sufficient excuse.[28]

The City of Jackson was ordered to integrate its swimming pools more than seven years ago. It must now do so—whether or not there will be real or imagined problems in carrying out that order.

D. *The Fact That the Closing of the Municipal Swimming Pools Denied the Use of Their Facilities to All Residents of the City of Jackson Cannot Justify the Abridgement of Petitioners' Constitutional Rights.*

The majority below, in accepting and "blessing" the two excuses offered by the City for closing its swimming and wading pools, also gave credence to the district court's conclusion that "where a public facility is closed to members of all races, any issue as to discrimination becomes moot" (A. 30). In Circuit Judge Rives' words:

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[28] The majority below admitted this principle, correctly citing *Cooper* v. *Aaron* (A. 48). But only a few pages later (A. 54), Judge Rives concluded that petitioners were *not* denied equal protection because the asserted threat to safety and economy—created by integrating the pools—*did* establish a constitutional justification for the closings. This kind of circular reasoning and boot-strapping leaves one lost in a semantic bog of specious distinctions between "mere racial motivation," and "racially discriminatory purpose" (A. 56). Indeed "[p]roof of an evil motive or of a specific intent to deprive a person of a constitutional right is generally not required under Section 1983." Mr. Justice Brennan's concurring-dissenting opinion, in *Adickes*, 90 S. Ct. at 1642.

> As to swimming pools, which a city may furnish or not at its discretion, it seems to us that a city meets the test of the equal protection clause when it decides not to offer that type of recreational facility to any of its citizens on the ground that to do so would result in an unsafe and uneconomical operation (A. 49).

The fallacy of this reasoning rests in the fact that both courts blandly assume that the closing of public facilities has the same effect on both the black and white citizens involved. But, as this Court so dramatically pointed out in *Griffin, supra,* the effect of the closing of the public school system in Prince Edward County was infinitely more disastrous to the black children than it was to their white counterparts. In Mr. Justice Black's words:

> Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient (377 U.S. at 230).

But one hardly had to wait for *Griffin* to ascertain this Court's stand. The answer is to be found in *Brown* v. *Board of Education* itself:

> To separate [black children] from others of similar age and qualifications solely because of their race generates *a feeling of inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

347 U.S. at 494 (emphasis added). While it is true that, prior to *Brown,* white children were segregated by law in the same states of the Union that segregated black children, there was never a contention that the majority group was deprived of equal educational opportunities thereby. If "separate educational facilities are inherently unequal," 347 U.S. at 495, insofar as children of the *minority* group are concerned, then the closing of pools by the majority group to prevent integration is similarly "inherently unequal."

Any other analysis would signify a return to the days of *Plessy* v. *Ferguson, supra.* It would be intolerable if we were to resuscitate at this late date Mr. Justice Brown's cavalier observation in *Plessy* that

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act but solely because the colored race chooses to put that construction on it (163 U.S. at 551).

As Circuit Judge Wisdom points out, this court has consistently struck down statutes which, while equally applicable on their face to both black and white citizens, are based upon racial considerations (A. 62-66). See e.g. *Loving* v. *Virginia,* 388 U.S. 1 (1967); *Anderson* v. *Martin,* 375 U.S. 399 (1963) and *Griffin* v. *County School Board of Prince Edward County, supra.* The point is that, in the United States, laws which refer to race can never be neutral, but always reflect in some degree the history of slavery, and the black man's traditional position of inferiority.

This Court understands full well the pyschological factors that are at work. The holding in *Brown* rested squarely on such a basis.[27] Now this Court must again choose between the psychological theory of *Plessey* and the psychological theory of *Brown;* there is no third route.

E. *The Action of Respondents Openly Encourages and Fosters Private Discrimination.*

By closing its public swimming and wading pools, the City of Jackson has ensured that private swimming facilities will be developed to take their place. That the private pools will be for whites only, there can, of course, be no doubt. Indeed, the City showed the way by returning the Leavell Woods pool to private hands, knowing full well that it would be operated by the white-only YMCA on a white-only basis.[28] The City was instructing those of its white residents who wanted to swim how to get back into the segregated waters. It would be hard to imagine a more clear example of people "harness[ing] the energies of private groups to do indirectly what they cannot . . . allow their government to do," *Reitman* v. *Mulkey,* 387 U.S. 369, 383 (Douglas, J., concurring) (1967).

This Court has never established a single infallible test for determining when a State has become involved in private discrimination to an unconstitutional degree. Rather, the lines have been sketched on a case-by-case basis. Wherever the line is ultimately drawn, however, it is clear

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[27] See the psychological studies cited in footnote 11 of *Brown* v. *Board of Education,* 347 U.S. at 494.

[28] As previously indicated, this is fast becoming a south-wide pattern. See Brief of Amicus Curiae, and the Albany, Georgia, experience, described in fn. 35, p. 40, *infra.*

that, in this case, respondents have gone far beyond what is constitutionally permissible. As Mr. Justice Harlan said for the Court recently in *Adickes* v. *S. H. Kress & Co.*, —— U.S. ——, 90 S. Ct. 1598, 1605 (1970):

> Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act *to compel or encourage* racial segregation. (Emphasis added.)

This Court undertook a systematic review of the cases dealing with state-encouraged private discrimination in *Reitman* v. *Mulkey, supra.* Mr. Justice White's careful discussion began with *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U.S. 151 (1914), characterizing it as a case which forbid mere "authorization to discriminate," 387 U.S. at 379. Justice White's characterization of the action taken in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), was even more forceful and directly relevant to the instant case:

> Although the State neither commanded nor expressly authorized or encouraged the discriminations, the State had "elected to place its power, property and prestige behind the admitted discrimination" and by "its inaction . . . has . . . made itself a party to the refusal of service . . ." which therefore could not be considered the purely private choice of the restaurant operator.

387 U.S. at 380. Here the city officials have publicly committed themselves to opposing "intermingling" in the pools,

and have directly made available City property—the Leavell Woods pool—for private and segregated use.[29]

The *Mulkey* Court considered finally a trio of sit-in cases, *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963); *Robinson* v. *State of Florida*, 378 U.S. 153 (1964); and *Lombard* v. *State of Louisiana*, 373 U.S. 267 (1963). Read together, these cases held that otherwise neutral trespass laws were tainted by the presence of a State policy encouraging segregation, even when a private person who had not actually been influenced by the state regulations, sought to invoke them. Mr. Justice Brennan canvassed those same three decisions in his concurring and dissenting opinion in *Adickes*. What he said about restaurant owners is equally applicable to private persons and corporations who operate, or will operate, white-only swimming and wading pools in Jackson:

> Thus, when private action *conforms with state policy*, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action. In sum, if an individual discriminates on the basis of race and does so in conformity with the State's policy to authorize or encourage such discrimination, neither the State nor the private party will be heard to say that their mutual involvement is outside the prohibitions of the Fourteenth Amendment.

90 S. Ct. at 1626 (emphasis added).

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[29] In this regard, the Fifth Circuit majority's cavalier statement in a footnote that the City is not implicated in the operation of the Leavell Woods pool (A. 37), is simply incredible. "There is no such thing as the state's being just a little bit discriminatory." *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 835 (E.D. La. 1967).

The *Mulkey* Court approved the three-pronged analysis which the California Supreme Court had used in examining that State's constitutional amendment on the subject of open housing laws. 387 U.S. at 1630. A similar examination of the "immediate objective," the "ultimate effect," and the "historical context and the conditions existing prior to its enactment" would be instructive here as well.

1. The "immediate objective" of closing the pools in Jackson was to avoid the integration directed by *Clark* v. *Thompson, supra.* It is clear from the affidavits of respondents, and from all of the opinions below, that that desegregation order was both the occasion for, and the motive behind, the closings.

2. The "ultimate effect" has been to deny to black citizens of Jackson the use of public swimming facilities, where before there had at least been one. In human terms, this has meant the lives of the two black children who had drowned in the Pearl River by the time this lawsuit was filed, A. 6, and others who have no doubt met a similar fate during the years that followed.

3. The "historical context" is, of course, the "steel-hard, inflexible, undeviating official policy of segregation," *United States* v. *City of Jackson,* 318 F.2d 1, 5 (5th Cir. 1963).

This three-part analysis only accentuates what is obvious—that the "private" discrimination by the YMCA and others is really attributable to the City itself.

Jackson has not, of course, passed any ordinances forbidding integrated swimming. Nor has it attempted the slightly more sophisticated technique of giving direct pub-

lic aid to private segregated ventures. But there should be no doubt that the City has directly encouraged and fostered the growth of such facilities. Not only has the City withdrawn from the field—thus creating opportune market conditions for private enterprise; not only has the City turned one leased pool directly over for segregated use by the YMCA, but City officials have also, by their public statements and actions, strengthened and nurtured Mississippi's traditional policies and customs with respect to the separation of the races. Any doubt that such customs are themselves part of the state's "law," and thus an element of "state action," was removed by Mr. Justice Harlan's recent opinion for the Court in *Adickes*:

> This interpretation of custom recognizes that settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements. If authority be needed for this truism, it can be found in Nashville, C. & St. L. Rwy. v. Browning, 310 U.S. 362 (1940), where the Court held that although a statutory provision suggested a different note, the "law" in Tennessee as established by long-standing practice of state offices was that railroads and public utilities were taxed at full cash value. What Justice Frankfurter wrote there seems equally apt here:
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> "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded

traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text." Nashville, C. & St. L. Rwy. v. Browning, *id.*, at 369.

And in circumstances more closely analogous to the case at hand, the statements of the chief of police and mayor of New Orleans, as interpreted by the Court in Lombard v. Louisiana, 373 U.S. 267 (1963), could well have been taken by restaurant proprietors as articulating a custom having the force of law. Cf. Garner v. Louisiana, 368 U.S. 157, 176-185 (1961); Wright v. Georgia, 373 U.S. 284 (1963); Baldwin v. Morgan, 287 F.2d 750, 754 (5th Cir. 1961).

90 S. Ct. at 1614.

The key to this case is to cut through the semantic jungle, and to see what the City of Jackson has in fact accomplished. Characteristically, Judge Wisdom has done so:

The City's action tends to separate the races, encourage private discrimination, and raise substantial obstacles for Negroes asserting the rights of national citizenship created by the Wartime Amendments. . . . We should not be misled by focusing on the City's nonoperation of the pools. Closing the pools as an official act to prevent Negroes from enjoying equal status with whites constituted the unlawful state action: it had the same purpose and many of the same effects as maintaining separate pools (A. 72).

II.

The action of respondents denies to petitioners and the members of their class effective judicial remedies and in effect, punishes them for resorting to the legal process.

At the end of his dissenting opinion below, Circuit Judge Wisdom sadly surveyed the wreckage around him:

> The closing of the City's pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities.

(A. 71-72). In short, Jackson's Negroes have been punished by the City for having the "audacity" to sue for their rights in federal court. But punishment of this kind is forbidden by the decisions of this Court, and by a battery of federal statutes.[30]

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[30] This Court has more than once undertaken an exhaustive study of the whole panoply of federal remedies enacted by the Reconstruction Congress. Outstanding examples are *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Adickes* v. *S. H. Kress & Co.*, —— U.S. ——, 90 S. Ct. 1598 (1970).

On many occasions, this Court has reminded us of the evils inherent in any governmental actions that tend to chill the exercise of constitutional rights. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). This is particularly true where political litigation is concerned. In *NAACP* v. *Button*, 371 U.S. 415 (1963), the Court pointed out that "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." 371 U.S. at 429-30.

The Civil Rights Act of 1866, 14 Stat. 27, guarantees to all citizens the same right to use the legal system of this nation "as is enjoyed by white citizens." 42 U.S.C. §1981.[21] Petitioners, acting as "private attorneys general," *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968), sought redress in the courts to end segregation in the public facilities of their city. It was in response to this federally protected action that the City of Jackson imposed its sanction—closing the swimming and wading facilities altogether. It is axiomatic that the City may not thus punish black citizens for doing what a federal statute—42 U.S.C. §1981—gives them a right to do.[22]

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[21] "This law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings and customs having the force of law, which sanction the wrongful acts specified." *Civil Rights Cases*, 109 U.S. 3, 16 (1883).

[22] This Court dealt with a similar situation, this time involving the Civil Rights Act of 1964 in *Hamm* v. *City of Rock Hill*, 379 U.S. 306 (1964). There, the Court "emphasized the precise terms of §203(c) that prohibit any attempt to punish persons for exercising rights of equality conferred upon them by the Act." *State of Georgia* v. *Rachel*, 384 U.S. 780, 804 (1966). The "attempt to punish" condemned in *Hamm* (and, indirectly, in *Rachel*) was not only the ultimate possibility of a conviction, but also the harassing tactic of the prosecution itself. Thus, the fact that the government employed sanctions against persons for the legitimate exercise of rights guaranteed under a federal statute is sufficient to invalidate those sanctions without more.

When the Reconstruction Congress enacted this legislation, it extended to black people the protective mantle of a federal statute which protected any of them who sought the aid of the judicial system. "That Congress," the first Justice Harlan noted,

> "undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure, to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely the same right to make and enforce contracts, to sue, be parties, give evidence and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens . . ."[22]

Civil Rights Cases, 109 U.S. at 35 (dissenting opinion). The City of Jackson cannot be permitted to destroy or nullify any of "those fundamental rights."

The City's action in closing the swimming and wading pools in response to a federal court order integrating them is further violative of Section 1981 in that it may affect future decisions of black people to seek legal redress. Before undertaking to desegregate parks, pools or whatever, such prospective plaintiffs must decide whether the risk created by a successful law suit—the total closing of the facility—is worth the benefit of their right to sue. Perhaps, as Circuit Judge Wisdom pointed out, "Negroes will

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[22] This Court has, only recently, provided a remedy for one who was punished by being expelled from a Virginia nonstock corporation operating a community park and playground facility for assigning his lease to a black man. *Sullivan* v. *Little Hunting Park, Inc.*, —— U.S. ——, 90 S. Ct. 400 (1969). "If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by §1982. Such a sanction would give impetus to the perpetuation of racial restriction on property." 90 S. Ct. at 404.

now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities" (A. 72).

Both Congress and the courts have recognized that it is imperative that a party not be punished for bringing a complaint before a court or administrative agency. For example, Congress has made it an unfair labor practice for an employer to discharge or discriminate against, or for a union to restrain or coerce, an employee, because he has brought a complaint to the National Labor Relations Board, Sec. 8(a)(4) and 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(a)(4) and (b)(1)(A). It is an unlawful employment practice for an employer to discriminate against an employee who has brought charges under Title VII of the Civil Rights Act of 1964, 47 U.S.C. (2000 P. 3(a)). Under Title II of the same act, it is illegal to punish or attempt to punish any person for exercising or attempting to exercise any rights secured under that title, 29 U.S.C. 200a-2(c).[34]

Respondents' closing of the pools, if held constitutional, would put black people in the position of having to make the best of two bad choices. They could (1) accept segre-

[34] In forbidding such sanctions, Congress was acutely aware that the persons whom such legislation was intended to benefit are often in a position where those against whom their complaint is brought have the power to penalize them. Thus, Congress has wisely created a policy of protecting those who use their legal remedies.

This Court, well understanding the utter importance of unimpeded access to judicial and quasi-judicial bodies, has recently unanimously found that not only is an employer or a union forbidden to take coercive action against an employee who complains to the N.L.R.B., such activity is also forbidden to the states. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967). See also *Crandell* v. *Nevada*, 73 U.S. 35 (1868) and *In re Querles and Butler*, 158 U.S. 532 (1895).

gated public facilities which are obviously unconstitutional or (2) institute litigation to integrate such facilities, knowing that if they are successful, public officials might close both the black and the white facilities. The result of demanding enforcement of their constitutional right may result, as it has for the black people of Jackson, Mississippi,[35] with their having less use of public facilities. Before suit was brought to integrate Jackson's swimming pools, black people could use at least one public pool. In direct response to that suit, all of the pools have been closed. This is indeed too high a price to pay for acting to enforce one's constitutional rights.

This Court has been conscious that forcing a complainant to make such hard choices constitutes an unreasonable burden. In *N.L.R.B.* v. *Industrial Union of Marine and Shipbuilding Workers of America,* 391 U.S. 418 (1968), it agreed with the N.L.R.B. that under the National Labor Relations Act, a union member could not be expelled from his union for bringing a charge against his union without exhausting intra-union grievance procedures. In explaining that such a rule forced the member to guess whether a specific procedure would be held reasonable, this Court stated at 425, "That risk alone is likely *to chill the exercise of a member's right* to a Board remedy and induce him to forego his grievance or pursue a futile union proce-

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[35] As well as Montgomery, Alabama (A. 73) and Canton, Edwards, West Point and Greenwood, Mississippi, among others, see Brief of Amicus Curiae. In Albany, Georgia, Tift Park Swimming Pool was closed to avoid integration, and then sold at one-fourth of its value to the Herald Publishing Co. which promptly gave the pool to the Boys' Club. It is now operated on a white-only basis. *Gaines, et al.* v. *The City of Albany, Georgia, et al.*, Civil Action No. 987 (M.D. Ga. 1968).

dure."[36] (Emphasis added.) See also *Ryan* v. *International Brotherhood of Electrical Workers,* 361 F.2d 942 (7th Cir. 1966), cert. den. 385 U.S. 936 (1966). *Pettway* v. *American Cast Iron Pipe Co.,* 411 F.2d 998 (5th Cir. 1969).

This Court has likewise found, of course, that state activity may have the purpose and effect of chilling an individual's use of his constitutional rights. Such activity is forbidden. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). Access to the courts is certainly chilled when the plaintiff finds himself in a worse position by winning a suit than by not acting at all. Sec. 1981 gives black people the same right to sue as white people in every court in the nation, but the City of Jackson has attempted to burden that right.[37]

The right to bring suit in federal court is an essential right, being the usual and, often, only way of redressing constitutional grievances. Such essential rights are pro-

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[36] "A proceeding by the Board is not to adjudicate private rights but to effectuate a public policy." 391 U.S. at 424.

[37] This Court certainly needs no reminder of the role private litigants have played in the implementation of a policy of racial equality in recent years. See, e.g., *Brown* v. *Board of Education, supra,* and *Clark* v. *Thompson, supra,* the case that led to the closing of Jackson's bathing pools. In fact, implementation of the rights guaranteed by the Amendments primarily is dependent upon the initiative of individual persons who must invoke the jurisdiction of the federal courts to stop unconstitutional discrimination. *N. A. A. C. P.* v. *Button; Newman* v. *Piggie Park Enterprises,* both *supra.*

Congress, realizing the importance of private suits in ending discrimination in public facilities, has expressly stated in Title III of the Civil Rights Act of 1964, 42 U.S.C. 2000 b-2, that nothing in the Act adversely affects the right of any person to obtain relief in court for such unconstitutional activity. See also *Edwards* v. *Habib,* 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969), in which eviction in retaliation for filing a Housing Code complaint was forbidden.

tected from all forms of intimidation as well as from violence. *United States* v. *Board of Education of Green County,* 332 F.2d 40 (5th Cir. 1964), *United States* v. *Beaty,* 288 F.2d 653 (6th Cir. 1961). The right of petitioners to institute federal corrective litigation is near to meaningless if victories are worse than merely Pyrrhic. The City of Jackson, through its public officials, is hindering the attempt of black people to integrate its public facilities. The message to black people will be clear and unambiguous if this Court allows the decision below to stand. In Circuit Judge Wisdom's words, "[T]hey must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities" (A. 72).

This Court should not force black people to make such a choice.

III.

The action of respondents in closing the pools of the City of Jackson violates the Thirteenth Amendment.

We live in a nation striving to rejoin the human race.[38] More than a century after the Civil War, we are still deeply involved in the business of putting an end to our greatest shame—the institution of human chattel slavery. Progress has been painfully slow; the end is not yet in sight. Now, we are at a crossroads, for precisely at a time when new promises are being made to the ex-slaves to speed up the pace of change, there are other forces at work seeking to slow down and, indeed, totally reverse the trend.

The City of Jackson has presented a challenge to this nation and to this Court. Stripped of ingenious appeals to "equal application," and disgenuous appeals to safety and economy, the City has put before this Court the following proposition: "Blacks are inferior; they are former slaves —beasts of burden; they are barely human, 'beings of an inferior order,'[39] and we simply will not tolerate them sullying the waters of our swimming pools."

This Court must now decide whether to accept or reject that proposition and that challenge. For this Court to affirm the decision below would be to revive *Dred Scott,* and to bury the Thirteenth Amendment.

Actually, this Court has only recently accomplished the historic task of rediscovering and enunciating the power

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[38] *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 449 n. 6 (Douglas, J., concurring) (1968).

[39] *Scott* v. *Sandford,* 60 U.S. (19 How.) 393, 404 (1857).

and thrust of the Thirteenth Amendment. In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that Congress had the power under that Amendment to pass virtually any law that had as its aim the eradication of even a vestige of the former slave system. In the ringing words of Mr. Justice Stewart, writing for the Court: "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440. The Court found that it was not irrational for the Reconstruction Congress to have determined that discrimination in the sale of real property was a relic of slavery.[40]

In *Jones,* the Court specifically left open the question whether the Thirteenth Amendment *itself* did more than to abolish slavery and establish universal freedom. Put another way, the open question is whether this Court must await a congressional determination of what are "badges and indicia of slavery," or whether it, too, can identify and then eliminate every "relic of slavery."

There is little doubt as to how the Court will, and must, answer this question, when faced with a case without any

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[40] The Court actually went considerably further than that, for it indicated that not only was it *rational* for *Congress* so to determine, but the proposition was *in fact true.* Mr. Justice Stewart wrote:

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights were substituted for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Id. at 441-42.

congressional pronouncements—such as the present one. The answer is really contained in the *Civil Rights Cases*, 109 U.S. 3 (1883)—not only in the famous dissent of the first Mr. Justice Harlan, but in the majority opinion of Mr. Justice Bradley as well. The latter wrote:

> This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. . . . [I]t has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States . . .

Id. at 20.

The Bradley opinion conceded that the amendment authorized Congress to go beyond the existence of *actual* enslavement, in order to reach all of its badges and incidents. Obviously, the amendment could only authorize Congress to go that far if the amendment itself was not narrowly confined to actual slavery.

Mr. Justice Stewart recognized this in footnote 78 of the *Jones* opinion, 392 U.S. at 441, overruling *Hodges* v. *U.S.*, 203 U.S. 1 (1906). *Hodges* had held that the Thirteenth Amendment, and therefore congressional action pursuant to it, reached only cases of actual enslavement. Mr. Justice Stewart responded that this narrow reading was "irreconcilable with the position taken by every member of this Court in the *Civil Rights Cases* and *incompatible with the history and purpose of the Amendment itself.*" (Emphasis added.)

When this Court sees a vestige of the slave system existing in our Nation, it thus has the constitutional duty to root it out and destroy it utterly, no matter in what form it may appear. The question facing this Court is thus simply stated: Is the refusal to allow black people to swim in Jackson's pools "a badge and indicia of slavery" or "a relic of slavery"?

The answer is so self-evident that it seems almost superfluous and redundant to discuss it. If discrimination in the wholly private sale of a house was characterized as "a relic of slavery" by the *Jones* Court, how could resistance to integration in a public swimming pool be held to be otherwise? If the Thirteenth Amendment means that a black man has "the freedom to buy whatever a white man can buy, the right to live wherever a white man can live," 392 U.S. at 443, how can it not mean that a black man can swim wherever a white man can swim?

This kind of simple and forthright analysis utterly demolishes the lower court's degrading theory that what Jackson has done is not so bad, since only a "non-essential" facility is involved. The Thirteenth Amendment does not differentiate between discrimination in areas of more or less "importance." White people do not have the right to "grant" equality in schooling, in voting, and in housing, but withhold it in a swimming or wading pool. The Thirteenth Amendment *guarantees* the end of inferiority in *every* area of our national life.

The Thirteenth Amendment has this sweep for an important reason—it overruled *Dred Scott*. The national law of slavery announced in that decision is the shame and despair of this Nation and this Court, but its historical analysis of

slavery was very accurate indeed. Chief Justice Taney pointed out that the entire system of slavery rested on a single proposition—the innate inferiority of the black man. This was the heart and soul of slavery, its axiom, its article of faith, its guiding principle. Blacks were, in the eyes of the dominant white majority, not even "people," but "beings of an inferior order," 60 U.S. at 404. When the Thirteenth Amendment eradicated *Dred Scott,* therefore, it did far more than simply to end the legal relationship of slave to master. What it did was to rewrite our national ideology, to declare that black people are truly human beings, fully equal in *every* respect to white men, and, indeed, to all men. Henceforth, the ex-slave was to have *the same rights* as a white man in every aspect of national life. See Kinoy, *The Constitutional Right of Negro Freedom,* 21 Rutgers L. Rev. 387 (1967); *The Constitutional Right of Negro Freedom Revisited,* 22 Rutgers L. Rev. 537 (1968); *Jones* v. *Alfred H. Mayer Co.: An Historic Step Forward,* 22 Vand. L. Rev. 475 (1969); and *The Present Crisis in Legal Education,* 24 Rutgers L. Rev. 1 (1970).[40a]

[40a] See also the recent Edward Douglass White Lectures on Citizenship by Prof. Charles L. Black, Jr., in March 1968, at Louisiana State University in which Prof. Black stated:

> "I have to say that herein I am walking over recent footsteps—those of Professor Arthur Kinoy, whose article [*The Constitutional Right of Negro Freedom, supra*], published last fall, stated the case in considerable analytic and historical depth for our revitalizing the elder Justice Harlan's views in dissent in the *Civil Rights Cases* of 1883, and finding in the command that the Negro shall be a citizen a command not merely that he rejoice in that honorific label, but also that he be allowed, both by the State and by those who actually control the matter, to participate fully in the public life of the society of which he is a citizen. I shall not try to improve either on Justice Harlan or on Professor Kinoy, but will add a few peripheral observations." (Footnotes omitted.)

Black, *Structure and Relationship in Constitutional Law.* Baton Rouge: Louisiana State University Press (1969) pp. 53-54.

In his concurring opinion in *Jones*, Mr. Justice Douglas reviewed many of the cases that this Court has decided under the Equal Protection clause in the last fifteen years, and showed that they can be more fully understood, and their impact better appreciated, by reference to the Thirteenth Amendment. All of those cases—from schools to public accommodations, to housing, to voting—reflect the resistance of the old slave South to change, "a spectacle of slavery unwilling to die." 392 U.S. at 445-49. Each new disguise, each strategy for delay, is a throwback to slavery and its single rule that blacks are inferior, and not fit to associate with white people, particularly in close quarters.[41]

This Court must look at the present case in the same way. Petitioners are entitled to a reversal here because of the simple fact that the City of Jackson has said that blacks are unfit to swim in the public pools. "Blacks are so inferior," the City is saying, "that their mere presence in our waters will create riots and economic chaos." Stated another way, the slave cannot be allowed to dirty the pools of the master race.

In *Chandler* v. *Judicial Council*, —— U.S. ——, 90 S. Ct. 1648 (1970), Mr. Justice Black eloquently discussed the promises of our constitutional system of law:

> Our Constitution gave new hope and dreams for freedom and equal justice to citizens of this country and signaled to the suffering and oppressed people everywhere that government could be humane.

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[41] One example Justice Douglas used is strikingly applicable here: "The blacks who travel the country . . . may well learn that the 'vacancy' sign does not mean what it says, *especially if the motel has a swimming pool.*" *Id.* at 447 (emphasis added).

90 S. Ct. at 1683 (dissenting opinion). But words and phrases, no matter how moving or how eloquent, can no longer convince a despairing and doubt-ridden people, who live, as James Baldwin has put it, in a daily state of rage, that government is even credible, much less humane.[42]

This Court must *now* finish the historic work that was begun in *Jones*. This Court must *itself* reaffirm that Negroes are free and equal citizens of the United States, rather than "beings of an inferior order." This Court must keep the promise of the Thirteenth Amendment. In a word, this Court must reverse the decision below, lest *Dred Scott* once again becomes the law of the land.

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[42] Recently, former Chief Justice Warren, in asking that the slate of "our original sin of slavery" be "wiped clean," said as follows:

> "... we find that hundreds of thousands of black children are denied equal opportunities of education; like numbers of adults are denied the privilege of voting; litigants, witnesses and jurors are deliberately humiliated in court rooms; people are denied the right to live wherever they choose; and a myriad other indignities are imposed on millions merely because of their color."
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> The Twenty-Seventh Annual Benjamin Cardozo Lecture delivered before the Association of the Bar of the City of New York on April 9, 1970. The Record, Vol. 25, No. 6, June 1970, 351, 354.

CONCLUSION

The judgment below should be reversed and the district court directed to issue a permanent injunction requiring respondents or their successors in office to operate the municipal swimming and wading facilities of the City of Jackson on an integrated basis.

Respectfully submitted,

ERNEST GOODMAN
PAUL A. ROSEN
WILLIAM H. GOODMAN
3220 Cadillac Tower
Detroit, Michigan 48226
(313) 965-0050

ARTHUR KINOY
WILLIAM M. KUNSTLER
Center for Constitutional Rights
588 Ninth Avenue
New York, New York 10036
(212) 265-2500

W. WILLIAM HODES
305 Baronne St.
New Orleans, La.
(504) 525-4361

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